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Attorneys for Plaintiffs
Berti Produce – San Francisco, Inc.; Edwin Chin
dba New City Fruit & Produce; Jacobs, Malcolm & Burt;
North Bay Produce, Inc.; Washington Vegetable Company;
What A Tomato Produce Company, Inc.; and Coosemans
San Francisco, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BERTI PRODUCE – SAN FRANCISCO,
INC.; EDWIN CHIN dba NEW CITY FRUIT
& PRODUCE; JACOBS, MALCOLM &
BURTT; NORTH BAY PRODUCE, INC.;
WASHINGTON VEGETABLE COMPANY;
WHAT A TOMATO PRODUCE COMPANY,
INC.; and COOSEMANS SAN FRANCISCO,
INC.,

Plaintiffs,

v.

ROBERT SBRAGIA; JOHN SBRAGIA;
STEVEN SBRAGIA; and PATRICIA CINI
aka PATTI CINI,

Defendants.

CASE NO. C11-03546 MEJ

**CASE MANAGEMENT CONFERENCE
STATEMENT & REQUEST TO
CONTINUE CMC**

CMC Date: October 27, 2011

CMC Time: 10:00 a.m.

**CMC Place: Ctrm. B, 15th Floor
San Francisco**

Plaintiffs BERTI PRODUCE – SAN FRANCISCO, INC., EDWIN CHIN dba NEW
CITY FRUIT & PRODUCE, JACOBS, MALCOLM & BURTT, NORTH BAY PRODUCE,
INC., WASHINGTON VEGETABLE COMPANY, WHAT A TOMATO PRODUCE

COMPANY, INC., and COOSEMANS SAN FRANCISCO, INC. (jointly “Plaintiffs”) respectfully file this Case Management Conference Statement.

A.

STATUS & REQUEST FOR CONTINUANCE

1. Current Status – Defendants Not Yet Served:

On July 19, 2011, Plaintiffs filed their complaint in this matter. On September 13, 2011, Plaintiffs filed an amended complaint, which added a new Plaintiff, Coosemans San Francisco, Inc.

Plaintiffs counsel has had difficulty locating addresses for service of the Complaint on the four Defendants; however, we believe that we now have good addresses for service on all of the Defendants, and the First Amended Complaint and associated documents have been sent out for service. We expect that all Defendants will be served by next week, if they have not already been served.

2. Request for Continuance:

Because Defendants have not yet been served, but Plaintiffs are in the process of serving them, Plaintiffs respectfully request that the Case Management Conference be continued for 60 days to allow Plaintiffs to serve Defendants and so that Defendants can participate in the CMC.

B.

GENERAL CMC INFORMATION

1. Jurisdiction and Service. This Court has jurisdiction pursuant to the Perishable Agricultural Commodities Act (“PACA”), 7 U.S.C. § 499e(c)(5), and 28 U.S.C. § 1331. As noted above, Defendants have not yet been served, because Plaintiffs have not had good addresses for service. After an investigation, however, Plaintiffs now have what they believe are good service addresses, and the First Amended Complaint is out for service on all Defendants.

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1 **2. Facts:**

2 Plaintiffs, all of whom are licensed by the United States Department of Agriculture as
3 dealers of perishable agricultural commodities, sold and shipped fresh produce to Bob Sbragia
4 dba Bob's Produce Inc. ("Bob's Produce"), which accepted the produce, but failed to pay the
5 total sum due of \$269,030.85, plus interest and attorneys' fees, to Plaintiffs for the perishable
6 agricultural commodities.

7 Bob's Produce filed for Chapter 11 bankruptcy protection with the U.S. Bankruptcy
8 Court, for the Northern District of California, on June 2, 2011, Case No. 11-32150-TEC, which
9 was converted to a Chapter 7 proceeding on July 12, 2011. On August 25, 2011, the Court
10 closed the case, after the Trustee reported that there was no property available for distribution.
11 Because of the automatic stay, this action has not been initiated and litigated against Bob's
12 Produce.

13 Plaintiffs are informed and believe that at all relevant times Defendants were officers,
14 shareholders, and/or directors of Bob's Produce. Bob's Produce's bankruptcy schedules identify
15 each Defendant as a 25% shareholder in Bob's Produce, and the Petition is signed by Defendant
16 Patricia Cini, as Treasurer of Bob's Produce. Plaintiffs are further informed and believe that at
17 all relevant times Defendants – as officers, shareholders, and/or directors of Bob's Produce –
18 controlled the day-to-day operations, financial affairs, and PACA trust assets of Bob's Produce.

19 Plaintiffs included the required statutory on their invoices to properly perfect their PACA
20 trust claims or otherwise perfected their PACA trust claims as required by 7 U.S.C. §
21 499e(c)(3)&(4).

22 **3. Legal Issues:**

23 A. Did Bob's Produce violate PACA and breach its contracts with Plaintiffs by
24 failing to pay them promptly and in full for the perishable agricultural commodities that

1 Plaintiffs sold and shipped to it, and if so, what is the sum owed to Plaintiffs by Bob's Produce.

2 B. Did Plaintiffs properly perfect their PACA trust rights. 7 U.S.C. § 499e(c)(3)&(4)
3 [USDA licensees may perfect their PACA trust rights by printing specific language on their
4 invoices or by sending a PACA Trust Notice to Bob's Produce].

5 C. Are Defendants personally liable for the debt owed to Plaintiffs by Bob's Produce
6 for the fresh fruit and vegetables that Plaintiffs sold and shipped to it? See, e.g., Sunkist
7 Growers, Inc. v. Fisher, 104 F.3d 280, 282-284 (9th Cir. 1997)(“individual shareholders, officers,
8 or directors of a corporation who are in a position to control PACA trust assets, and who breach
9 their fiduciary duty to preserve those assets, may be held personally liable under the Act.”);
10 Golman-Hayden Co., Inc. v. Fresh Source Produce, Inc., 217 F.3d 348 (5th Cir. 2000)(citing
11 Sunkist and finding passive owner personally liable); Coosemans Specialties, Inc. v. Gargiulo,
12 485 F.3d 701, 705-07 (2nd Cir. 2007)(“PACA trustees ‘are required to maintain trust assets in a
13 manner that such assets are *freely available* to satisfy outstanding obligations to sellers of
14 perishable agricultural commodities.’ 7 C.F.R. § 46.46(d)(1)”; owner individually liable for
15 breach of fiduciary duty, as there is no factual dispute that factoring agreement jeopardized the
16 trust funds and made them unavailable for timely payment to plaintiffs.).

17 D. Are Plaintiffs entitled to pre-judgment interest, attorneys' fees, and costs.

18 **4. Related Cases:**

19 Plaintiffs are not aware of any related cases or proceedings.

20 **5. Relief Sought:**

21 Plaintiffs seek judgment against Defendants, jointly and severally, in the amount of
22 \$269,030.85 (sums due on invoices for fresh produce), plus interest, attorneys' fees, and costs.

23 **6. Consent to Magistrate Judge:**

24 Plaintiffs filed their consent to the assignment of this case to a U.S. Magistrate Judge.

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7. **Disclosure of Non-Party Interested Entities or Persons.**

Plaintiffs have filed the disclosure required by Civil L.R. 3-16, and they certified and do certify that as of this date, other than the named parties, there is no such interest to report.

Date: October 20, 2011

By: /s/ Marion I. Quesenbery

Marion I. Quesenbery

Attorneys for Plaintiffs

Berti Produce – San Francisco, Inc.; Edwin Chin
dba New City Fruit & Produce; Jacobs, Malcolm &
Burt; North Bay Produce, Inc.; Washington
Vegetable Company; What A Tomato Produce
Company, Inc.; and Coosemans San Francisco, Inc.

IT IS SO ORDERED. The Case Management Conference is continued to
January 12, 2012, at 10:00 a.m., in Courtroom B, 15th Floor, San Francisco.

All deadlines are adjusted accordingly.

Date: October 21, 2011



U.S. MAGISTRATE JUDGE

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